

ONE HUNDRED FIFTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
COMMITTEE ON ENERGY AND COMMERCE  
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**MEMORANDUM**

**May 15, 2018**

**To: Subcommittee on Environment Democratic Members and Staff**

**Fr: Committee on Energy and Commerce Democratic Staff**

**Re: Hearing on “Legislation Addressing New Source Review Permitting Reform”**

**On Wednesday, May 16, 2108, at 10:15 a.m. in room 2322 of the Rayburn House Office Building**, the Subcommittee on Environment will hold a hearing titled “Legislation Addressing New Source Review Permitting Reform.” This hearing will cover a discussion draft to amend sections 111, 169, and 171 of the Clean Air Act (CAA). The Subcommittee held an oversight hearing on the Environmental Protection Agency’s (EPA) New Source Review (NSR) program on February 14, 2018. Please see the Democratic committee [memo](#) from the February 14th hearing for further background information on the NSR program.

**I. RECENT CHANGES TO THE NSR PROGRAM**

William “Bill” Wehrum, the current Assistant Administrator for Air and Radiation at EPA, has said that reinstating Bush-era changes to the NSR program is a top priority for the agency. He has indicated that administrative actions can “continue to chip away” at the existing pollution control requirements for industry.<sup>1</sup> EPA released two major memos implementing significant changes to the NSR program, and has plans to make additional changes throughout 2018.<sup>2</sup>

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<sup>1</sup> *OAR’s Wehrum Prioritizes Piecemeal NSR Reform, Narrow Utility GHG Rule*, Inside EPA (Dec. 12, 2017) ([insideepa.com/daily-news/oars-wehrum-prioritizes-piecemeal-nsr-reform-narrow-utility-ghg-rule](http://insideepa.com/daily-news/oars-wehrum-prioritizes-piecemeal-nsr-reform-narrow-utility-ghg-rule)).

<sup>2</sup> *Smaller Bites in EPA Air Chief’s Second Pass at Permitting Update*, BNA (Apr. 16, 2018) ([www.bna.com/smaller-bites-epa-n57982091147](http://www.bna.com/smaller-bites-epa-n57982091147)).

The first EPA memo regarding NSR, released on December 7, 2017, allows operators to avoid installing pollution controls by including an *intention* to use post-project emissions management when calculating their projected actual emissions. The December memo also said that EPA would not “second guess” emissions estimates provided by operators, and that enforcement of NSR requirements would be delayed 5 to 10 years.<sup>3</sup>

The second EPA memo on NSR, released on March 13, 2018, which relates to “project emissions accounting,” allows a facility to consider emissions increases and decreases when determining if NSR requirements apply.<sup>4</sup> Currently, NSR applicability is determined in two steps. Step one requires a determination of whether the specific project alone would result in a significant emissions increase. If an increase results, then step two requires an evaluation of the significant *net* emissions increase, taking into account contemporaneous emissions increases and decreases at the entire facility. By only considering net emissions of the individual project in step one, this policy change would allow facilities to ignore contemporaneous emissions increases to avoid pollution control requirements under the NSR program. A 2006 Bush Administration proposed rule included a similar “project netting” loophole, however, it was never finalized.<sup>5</sup>

## II. ANALYSIS OF THE DISCUSSION DRAFT

The discussion draft makes a number of significant changes to the CAA, creating loopholes in the law that would allow facilities to avoid NSR pollution control requirements and increase emissions.

Section 2 of the draft changes how emission increases are calculated when determining if a project is subject to NSR, from a calculation of actual emissions to a calculation of the capacity to emit based on the “maximum achievable hourly emissions rate.”<sup>6</sup> This is a weaker test leading to pollution controls being required “only if a polluter ever managed to exceed, implausibly, its vastly higher *capacity* to emit air pollution, measured from some point in the plant’s past.”<sup>7</sup> EPA rejected a similar approach in 2002, pointing out:

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<sup>3</sup> For a more detailed analysis of EPA’s December 7 memo, please see the Democratic Committee [memo](#) from the February 14 hearing.

<sup>4</sup> Memorandum from Administrator E. Scott Pruitt to Regional Administrators, Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program (Mar. 13, 2018) ([www.epa.gov/sites/production/files/2018-03/documents/nsr\\_memo\\_03-13-2018.pdf](http://www.epa.gov/sites/production/files/2018-03/documents/nsr_memo_03-13-2018.pdf)).

<sup>5</sup> Environmental Protection Agency, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting*, 71 Fed. Reg. 45235.

<sup>6</sup> Sec. 2 (2).

<sup>7</sup> House Committee on Energy and Commerce, Subcommittee on Environment, Statement of John Walke, Natural Resources Defense Council, Hearing on “New Source Review Permitting

[Y]ou could modernize your aging facilities (restoring lost efficiency and reliability while lowering operating costs) without undergoing preconstruction review, while increasing annual pollution levels as long as hourly potential emissions did not change.<sup>8</sup>

Section 2 also excludes pollution control, reliability, and safety projects from the definition of a modification subject to NSR. The draft exempts projects that reduce any air pollutant even if other, possibly more dangerous, pollutants are increased as a result.<sup>9</sup> The immunity for reliability and safety projects is potentially even more expansive. The only limit to that loophole is a determination by the Administrator that an increase in the maximum achievable hourly emissions rate of any pollutant is harmful to human health or the environment and the project is not environmentally beneficial.<sup>10</sup> In the event that a change at a reliability or safety project *increases* its maximum achievable hourly emissions rate of a pollutant, the Administrator could still relieve the project from installing required pollution controls.

Finally, the discussion draft excludes projects at a specific facility that do not result in a significant emissions increase or net emissions increase, from the definitions of a modification. Sections 3 and 4 are similar to the project netting loophole included in EPA's March 13th memo on project emissions accounting. As discussed above, this loophole would allow an operator to avoid NSR pollution control requirements with accounting gimmicks that ignore emissions increases from an entire facility.

### **III. WITNESSES**

The following witnesses have been invited to testify:

#### **Panel I**

##### **Bill Wehrum**

Assistant Administrator  
Office of Air and Radiation  
Environmental Protection Agency

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Challenges for Manufacturing and Infrastructure” 115th Cong. (Feb. 14, 2018) (italics added for emphasis).

<sup>8</sup> Environmental Protection Agency, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, 67 Fed. Reg. 80185, at 80205.

<sup>9</sup> This change would overturn a D.C. Circuit Court of Appeals decision against a similar policy from the Bush Administration. *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005).

<sup>10</sup> Sec. 2 (3).

**Panel II**

**Jeffrey Holmstead**

Partner  
Bracewell LLP

**Kirk Johnson**

Senior Vice President  
National Rural Electric Cooperatives

**Ross Eisenberg**

Vice President, Energy and Natural Resources Policy  
National Association of Manufacturers

**Sean Alteri**

Director  
Kentucky Division for Air Quality

**Paul Baldauf, P.E.,**

Assistant Commissioner  
Air Quality, Energy and Sustainability  
New Jersey Department of Environmental Protection

**Bruce Buckheit**

Analyst and Consultant  
*Former Director*  
*Air Enforcement Division, Office of Enforcement & Compliance Assurance*  
*Environmental Protection Agency*